IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners,*

v.

MIDWEST VIDEO CORPORATION, *Respondent.*

PETITION FOR REHEARING

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This case involves the validity of a regulation promulgated by the Federal Communications Commission requiring all CATV systems with 3,500 or more subscribers to originate programs as a condition to their remaining in business. Midwest Video Corporation challenged the validity of this regulation as being beyond the authority of the Commission. The Court below held that the Commission lacked authority to adopt the regulation.

On June 7, 1972 this Court entered its judgment and issued an opinion in which a plurality of four judges

joined concluding that the Commission did have authority to promulgate the regulation in question—that the requirement for CATV systems to originate programs is reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of the television broadcasting. A plurality, also of four judges, adopted the opposite point of view. They pointed out that origination of programming is a far cry from CATV operation. It "requires new investment and new and different equipment and an entirely different cast of personnel." (Slip Opinion, page 2). Moreover, the structure of the Communications Act is such that while a license from the Commission is required before a person can enter the broadcasting business and only qualified persons may obtain such licenses, the Commission's function is limited to passing on applications for license "[b]ut nowhere in the Act is there the slightest suggestion that a person may be compelled to enter the broadcasting or cablecasting field." (Slip Opinion, page 3). The dissenting Opinion concludes that "whether CATV systems should be required to originate programs is a decision that we are certainly not competent to make and . . . the Commission is not authorized to make. Congress is the agency to make the decision and Congress has not acted." (Slip Opinion, page 1).

Somewhat the same plaint is found in the concurring opinion of the Chief Justice. He concedes "that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." (Slip Opinion, page 2). He concludes however "Congress has created its instrumentality to regulate broadcasting, has given it pervasive power, and the Commission has generations of experience and 'feel' for the

problem. I therefore conclude that *until Congress acts the Commission should be allowed wide latitude. . . .*" (*Ibid.;* Emphasis Supplied).

From a substantive point of view there is a remarkable similarity between the views of the four dissenting Justices and that of the Chief Justice. Both groups are obviously not satisfied that the Commission has acted within the scope of the statutory mandate set forth in the Communications Act. The minority would therefore set aside the Commission's regulation and leave to Congress the matter of whether the statute should be amended to confer jurisdiction upon the Commission. The Chief Justice, while adverting to the role of Congress, expresses the view that the action of the Commission should stand unless the Congress affirmatively disapproves.

Midwest submits that a rehearing should be granted to consider the nature of the authority which Congress has delegated to the Commission and the nature of the relationship between the Commission and Congress. It is apparent from a study of the Communications Act that Congress was careful to spell out the area of Commission jurisdiction and the manner in which it should exercise its power. In the area of broadcasting where the Commission exercises primary responsibility Congress made it clear that no person can operate a broadcast station unless he obtains a license from the Commission which commits him to operate in the public interest. But the statute is clear that the Commission is authorized to act only upon applications. It can pick and choose among those who seek authority to operate broadcast stations and can impose reasonable regulations upon those who do accept licenses. While the Commission can require a broadcast licensee to devote

a certain percentage of his broadcast time to local programs, there is nothing in the Communications Act whereby the Commission can compel a person to apply for a broadcast license against his will or force a broadcast applicant to build a station in a community different from the one for which he has applied or require a broadcast operator to establish a CATV system no matter how much the Commission believes the public would benefit from such mandated activity.

There is no reason in policy or law why a different result should be applicable to CATV—a field where the Commission exercises ancillary rather than primary responsibility. True, the Commission can, in light of *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) require a person to obtain Commission permission before operating a CATV system. And the Commission can impose reasonable regulations on the CATV operation such as the signals to be carried, technical quality of the service, non-duplication protection, etc. Moreover, the Commission can probably require that its consent be obtained before a person can engage in cablecasting (although this point has not been squarely decided either in *Southwestern* or the instant case) and can impose reasonable regulations upon such cablecasting so undertaken, including probably the obligation to carry a certain number of local programs. But it is an entirely different matter to require a CATV operator to become a cablecaster against his will. This is the equivalent of the Commission requiring a broadcast station to establish a CATV system or become a cablecaster. Sanctioning the Commission's approach would mean that the Commission possesses more authority with respect to its ancillary jurisdiction over CATV operations than it possesses over the pri-

mary field of broadcast operations. This is a power to be given, if at all, by Congress, not unilaterally assumed by the Commission.

In urging the appropriate role of Congress in this field, it is not necessary to predict whether or not Congress would act if the Commission's regulation were set aside. Under the Constitution this is a matter which is committed to the Congress and is not subject to the control of the Court or the Commission. In this connection it is not without significance to call attention to recent Congressional interest which has been evinced in the subject. Attached hereto are the remarks made by Senator McClellan on June 20, 1972 in connection with his introduction of S.J. Res. 247, a joint resolution extending the duration of copyright protection in certain cases. He specifically calls attention to the Commission's cable origination rules and concludes that it may be appropriate for the question of mandatory origination to be further reviewed in conjunction with the resolution by the Congress of the remaining cable television issues.

In seeking rehearing Midwest wishes to stress that it is not now challenging, nor has it in this litigation challenged, the pervasiveness of the Commission's jurisdiction over communications by wire or radio or the power of the Commission through its ancillary authority over CATV affirmatively to promote the basic objectives of the Communications Act. These questions are clearly and decisively resolved by the Court's opinions and are not questioned by Midwest. What Midwest seeks by its rehearing is a re-examination of the appropriate role of Congress with respect to Commission control over CATV—whether the mandate to CATV systems to become cablecasters against their will is a

matter on which Congress should legislate before the Commission acts or whether the Commission's regulations should stand unless and until Congress vetoes such action. The appropriate distribution of power between Congress, the Courts and the Commission requires that prior Congressional authority be obtained —that Congress not be relegated to the role of vetoer.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Court should grant a rehearing of this case.

Respectfully submitted,

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APPENDIX

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Remarks of Senator McClellan, in connection with the introduction of S.J. Rex. 247, Congressional Record, June 20, 1972, pp. 9772-9773:

By MR. MCCLELLAN:

S.J. Res. 247. A joint resolution extending the duration of copyright protection in certain cases. Referred to the Committee on the Judiciary.

MR. MCCLELLAN: Mr. President, as chairman of the Subcommittee on Patents, Trademarks, and Copyrights I introduce a joint resolution to extend the duration of copyright protection in certain cases.

The purpose of this legislation is to continue until December 31, 1974, the renewal term of any copyright subsisting on the date of approval of the joint resolution, or the term as extended by previously enacted public laws, where such term would otherwise expire prior to December 31, 1974. The justification for the prolongation of the renewal term of copyrights is that the pending legislation for the general revision of the copyright law includes a proposed increase in the length of the copyright term. The Congress has repeatedly expressed its will that the owners of expiring copyrights should not lose the benefits provided in the proposed new copyright law only because of the unfortunate circumstances which have delayed final action by Congress on the copyright bill.

Any substantial progress by the Congress on copyright revision legislation has been virtually impossible during the past several years because of the protracted delay of the Federal Communications Commission in adopting new cable television rules. A resolution of the cable television copyright issues was necessarily dependent upon the determination of the many regulatory issues. The FCC rules became effective on March 31 and it was only on June 16 that the Commission completed action on petitions for reconsidera-

tion of the rules. The completion of the Commission proceedings now paves the way for real progress in the Congress on the copyright bill.

It is apparent that adequate time does not remain in this Congress for the processing of this complex legislation. I presently know of no reason why the Subcommittee on Patents, Trademarks, and Copyrights cannot promptly report a revised bill in the next Congress. It shall be my intention to bring that bill to the floor at the earliest feasible date. Because certain provisions of the bill are highly controversial it is uncertain if it can be enacted into law during the first session of the 93d Congress. It will also be necessary to allow the Copyright Office a period of time to prepare for the administration of the new law and consequently the effective date of the legislation will have to be several months after its enactment. Under these circumstances it appears advisable to provide that the temporary extension of copyrights should continue until December 31, 1974.

The pending version of the copyright revision legislation, S. 644, other than for perfecting amendments, is identical to the text of the bill reported favorably by the subcommittee in the 91st Congress. The subcommittee has already determined its position on each of the many issues and in the absence of significant new developments I do not believe there is any necessity to repeat this detailed consideration. I know of no issue on which additional hearings are necessary.

One provision of the bill that will require some modification is the cable television section. The section approved by the subcommittee contains a coordinated resolution of copyright questions and of those regulatory issues that are necessarily related to copyright matters. The new rules of the FCC are generally consistent with the recommendations of the subcommittee and it is anticipated that the regulatory provisions now contained in S. 644 will be eliminated. The

subcommittee determined that all cable television systems should be subject to the copyright law and that the statute should grant such systems a compulsory license, subject to certain limitations relating to program exclusivity and sporting events, to carry the programs transmitted by specified broadcast signals. The subcommittee also approved a statutory CATV royalty schedule and established in chapter 8 of the legislation a copyright royalty tribunal to provide for periodic impartial review and adjustment of royalty rates.

Since the subcommittee action there have been two important CATV judicial decisions. In Columbia Broadcasting System, Inc. against TelePrompter, Inc. a Federal district Court interpreted the existing copyright statute as not applying to the secondary transmissions of a cable system even if the system is transmitting distant signals, using microwave, inerting advertising or originating its own programs. Previously the U.S. Supreme Court in United Artists against Fortnightly held that the activities of the cable system involved in that litigation did not constitute violation of the copyright law. Since the CBS case is now on appeal I do not wish to discuss the merits of that decision. The decision in that case does not change my opinion that cable systems should be under the provisions of the copyright law.

In another important cable television decision a sharply divided Supreme Court, in which there was no majority opinion, upheld the authority of the Federal Communications Commission to require certain cable systems to originate their own programs regardless of whether there is sufficient public demand to make such programing feasible. I have long felt that the action of the Commission was a dubious extension of its jurisdiction under the Communications Act and even if authorized by the Communications Act was not sound policy under existing conditions. The deciding vote in the Supreme Court was cast by the Chief Justice. I concur in his view that "I am not fully per-

suaded that the Commission has made the correct decision in this case and the thoughtful opinions in the Court of Appeals and the dissenting opinion here reflect some of my reservations." It is currently unclear what immediate action on this issue will be taken by the Commission. It may be appropriate for the question of mandatory origination to be further reviewed in conjunction with the resolution by the Congress of the remaining cable television issues.

The only other issue in the revision bill concerning which there has been significant developments subsequent to the action of the subcommittee concerns photocopying by libraries and other nonprofit institutions. A Commissioner of the Court of Claims has rendered the first judicial interpretation of the application of the Copyright Act of 1909 to library photocopying. He held that the systematic and widespread duplication of articles from copyrighted periodicals by the National Library of Medicine constitnted infringement of copyright. Since this case is also on appeal I again shall refrain from discussing the substance of the litigation. I observe only that the subcommittee anticipated this problem and had consequently added a special library photocopying section to the revision bill.

The subcommittee has been advised that the representatives of authors and book and periodical publishers are now meeting with library associations and other nonprofit users to explore whether agreement can be reached on the photocopying section of the copyright bill. I also understand that there is some prospect of discussions among interested parties on other issues of the bill. I have instructed the counsel of the subcommittee to prepare a modified version of the pending bill for consideration of the subcommittee in the 93d Congress. Therefore, it is to be hoped that any discussions among the parties will proceed expeditiously so that the outcome of these deliberations may be known in sufficient time to be considered in the draft being prepared by the subcommittee staff.

CERTIFICATE

I, Harry M. Plotkin, hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

HARRY M. PLOTKIN